BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WATTS CONSTRUCTION INC, and T.R. MASTERSON CONSTRUCTION OF WASHINGTON, INC., Appellants, v. BENTON CLEAN AIR AUTHORITY, Respondent.	PCHB NOS. 04-032, 04-037 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This case is an appeal by Watts Construction Inc., (Watts) and T.R. Masterson Construction of Washington, Inc., (Masterson) of a $6,000 civil penalty issued by the Benton Clean Air Authority (BCAA) for alleged violations of air quality regulations. The Board consolidated the two appeals. The Board held a hearing in Kennewick, Washington, on May 4, 2005. Tom Masterson, *pro se*, appeared on behalf of Watts and Masterson. Attorney Terry Tanner represented BCAA. The Pollution Control Hearings Board ("Board") consisted of Bill Clarke, Presiding, William H. Lynch, Chair, and David W. Danner. Dina Ranger of Bridges and Associates was the court reporter. The parties provided legal arguments, testimony through sworn witnesses, and introduced exhibits into the record. Based on the hearing, the Board enters the following:

I. FINDINGS OF FACT

[1]

BCAA is a municipal corporation with responsibility for enforcement of the Washington Clean Air Act and its implementing regulations in Benton County. Those regulations include WAC 173-400-040(2), which prohibits fugitive dust emissions that interfere with another's use or enjoyment of property, and WAC 173-400-040(8)(a), which requires that reasonable precautions be taken to prevent fugitive dust emissions.

[2]

Watts is a construction contractor specializing in earthwork and utility installation. Masterson is a general building contractor engaged in residential development and home building. Both companies are in Kennewick and have served the Tri-Cities area and Central Washington for many years. Riverview Pointe is a residential development in Kennewick, Washington, owned and managed by Riverview Pointe, LLC. Paula Butterworth is the managing member of Riverview Pointe, LLC. Neither Watts nor Masterson are members or owners of Riverview Pointe, LLC. Butterworth hired Tom Masterson, but not Masterson Construction as a development consultant for the Riverview Pointe project based on his expertise in residential development. Butterworth hired Watts to install utilities and do site preparation, including dust control. *Testimony of Loren Watts; Testimony of Tom Masterson; Testimony of Paula Butterworth.*

[3]

The Riverview Pointe development is roughly 42 acres in size. Mercer Construction will build 154 homes on the site, formerly owned by Kennewick Irrigation District. The scope of work provided by Watts for the Riverview Pointe project included stabilizing the residential building lots for dust control, hydromulching, dust control of the site during working hours, and dust control after hours and on weekends as needed. Dust control during working hours was included in the project cost provided by Watts; after-hours and weekend dust control was billed separately. Riverview Point, LLC, paid Watts approximately $72,000 for dust control and hydromulching at the project, $12,000 of which was for after-hours or weekend work not in the original scope of work.[1] No invoices were produced indicating dust control measures were taken after working hours from August 24 – October 12, 2003. *Testimony of Paula Butterworth; Testimony of Loren Watts; Exhibit A-1; Exhibit A-2; Exhibit A-3.*

[4]

Spraying water on the ground from water trucks was the primary method of dust control used by Watts at Riverview Pointe. Watts kept a 4,000 gallon water truck and a 10,000 gallon water wagon at the site for this purpose. Watts obtained water for dust control from a municipal water source and from Kennewick Irrigation District. Water was stored in a water tank on site used to fill the water truck and water wagon. There was no fixed schedule for water spraying, as it was done based on the condition of the soil and wind. *Testimony of Loren Watts*.

[5]

During July 2003, BCAA received dust complaints from individuals residing near the Riverview Pointe project. BCAA informed Watts and Masterson of the complaints. *Ex R-4.* Rob Rodger, an air quality specialist for BCAA, discussed the July 2003 dust control complaints with Tom Masterson and Loren Watts and conducted a site observation on July 8, 2003. At that time, the 4,000 gallon water truck and 10,000-gallon water wagon were being used for dust control, but plumes of blowing dust were visible. Rodger, Masterson, and Watts discussed proceeding with hydromulching the site to provide additional dust control. BCAA also received dust complaints on September 19, 2003. Hydromulching of the site was not done prior to the October 8, 2003, Notice of Violation, due to the fact that the site was not ready. *Testimony of Rob Rodger; Ex. R-4; Ex. R-5; Testimony of Loren Watts.*

[6]

Dust control measures are needed at construction sites when the soil is dry. The Tri-Cities area can be warm, dry and windy, all of which are factors that make dust control more difficult. Wind begins to pick up dust at between eight and 10 miles per hour. Adequate dust control relies on preventative measures, because once dust begins blowing at a site it is difficult to regain control. September and October of 2003 were especially dry months in the Tri Cities area. There is no record of any after hours watering at the site by Watts after August 24, 2003, until after the date of the violation in October. There are no regulatory or industry standards on the amount of water that should be applied to a construction site for dust control, but a 4,000-

[1] Three of the invoices prepared by Watts for dust control were for watering after October 8, 2003, the date of the

gallon water truck is generally considered adequate to control dust from a five acre construction site in the Tri Cities. Soils in the Tri-Cities area have limited water-holding capacity and can dry out and be vulnerable to producing blow dust only five minutes after being sprayed with water. *Testimony of Rob Rodger; Testimony of Dr. David Lauer; Testimony of Loren Watts.*

[7]

On October 8, 2003, Terry Flores of BCAA was returning to the BCAA office and saw blowing dust from a construction site. She determined the construction site was the Riverview Pointe development. She stopped at the office to get a camera, and went to the site with Dr. David Lauer, BCAA's Executive Director. One water truck was operating at the site, and was generating dust as it drove around the construction site. A second truck was at the site, but was not operating. Flores and Lauer observed ground level dust originating from the ground visibly moving off the site. Most of the dust was blowing from the north portion of the site. They agreed to issue a Notice of Violation for failure to control dust at the site. BCAA issued NOV 20030026 on October 15, 2003. *Testimony of Terry Flores;Ex R-1; Testimony of David Lauer.*

[8]

Terry Flores was not available to testify at the hearing before the Board. BCAA previously deposed Flores under oath. Mr. Masterson attended the deposition and cross-examined Flores. At the hearing, selected portions of Flores' deposition and cross-examination questions from Mr. Masterson were read into the record through BCAA witness Rob Rodger.

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violation.

Mr. Lauer, who accompanied Flores to the site, was available to testify and for cross-examination at the hearing.

[9]

After Terry Flores and David Lauer of BCAA inspected the site on October 8, 2003, BCAA informed Watts and Masterson of the blowing dust. On that day, there were workers active at the site at least during morning hours. Hydromulch was on the site, but was not put down because of windy conditions. The 10,000-gallon water wagon operated by Watts was temporarily out of service, so only the 4,000-gallon water truck was in use at Riverview Pointe. Watts sent an additional water truck to Riverview Pointe after receiving the complaint, and the truck arrived within 90 minutes. *Testimony of Loren Watts; Testimony of Rob Rodger; Testimony of Terry Flores.*

[10]

During the site visit on October 8, 2003, neither Flores nor Lauer took wind measurements. They were at the site for 30 – 45 minutes and took a number of photographs. The photographs show dust blowing at the site. The relative strength of the wind can be inferred from the photographs as they show dust blowing across the ground surface, and large trees and flagged construction stakes being blown by the wind. *Ex. R-5.* It is not known whether the photographs were taken during wind gusts or whether the photographs represented average wind conditions on October 8, 2003. Flores believed the wind was under 15 miles per hour at the site, while Lauer stated there was a lot of wind speed in the 15-20 miles per hour range. Lauer also indicated there were some slight gusts above 20 miles per hour. Watts and Masterson believe

winds were much higher than 15 miles per hour. *Testimony of Terry Flores; Testimony of Dr. David Lauer.*

[11]

The dust in the photos taken at the site includes both surface level and atmospheric dust. It is unknown how much of the blowing dust in the photo is dust blown onto the Riverview Point site from surrounding lands and how much of the blowing dust is dust originating from the Riverview Point site itself. Under the Board's preponderance of evidence or "more likely than not" standard in WAC 371-08-485(2) used for Board Findings of Fact, the Board finds it more likely than not that while some of the dust in the photos is atmospheric dust originating off the Riverview Pointe site, that ground-level dust was from Riverview Pointe. *Testimony of Terry Flores; Testimony of Dr. David Lauer; Testimony of Loren Watts.*

[12]

On December 15, 2003, BCAA issued a civil penalty in the amount of $6,000 for failure to control dust at the Riverview Pointe project on October 8, 2003. The penalty was issued jointly to Watts Construction and Masterson Construction. *Ex. R-3.* The penalty amount was calculated based on BCAA's penalty worksheet. *Ex. R-2.* The worksheet applies points to six different criteria: zero points if the criterion does not apply, one if the criterion possibly applies, two if the criterion probably applies, and three if the criterion definitely applies. The point total from the criteria are applied to a table indicating the amount of the penalty. BCAA issued two points each for the criteria for public health risk/property damage, willful or knowing violation, responsiveness in correcting violation, and adverse effect on enjoyment of property. BCAA

issued three points for history of similar violations and economic benefit from noncompliance. The total point score of 14 resulted in the civil penalty amount of $6,000. *Ex. R-2.*

[13]

BCAA issued Watts Construction air quality enforcement orders in 1992, 1994, 1995, and 2002. BCAA issued Masterson Construction air quality enforcement orders in 1995, 1999, and 2001. BCAA has not previously issued air quality enforcement orders against Paula Butterworth or Riverview Pointe LLC. Watts and Masterson stated that compliance with applicable regulations and policies is important to them and that both companies have made efforts to stay in compliance. BCAA had also issued written notice of the July dust complaints, and orally informed Watts and Masterson of the September complaints. Watts and Masterson were not pleased with the enforcement action by BCAA and testified that they felt they had made reasonable efforts to control dust at the Riverview Point project. *Testimony of Loren Watts; Ex. A-14.*

[14]

The BCAA Urban Fugitive Dust Policy is intended to meet federal requirements relating to control of the air pollutant PM_{10}, which is small particulate matter less than or equal to 10 microns in size. The air pollutant PM_{10} includes windblown dust. The Urban Fugitive Dust Policy has an exception under which additional dust control measures are not required during a dust storm. A two-hour average wind speed (of how many mph) from five specific wind speed stations in the Tri-Cities area is considered a "dust storm." *Testimony of Dr. David Lauer.*

[15]

On October 8, 2003, data from the wind stations used by BCAA to implement its Urban Fugitive Dust Policy showed two-hour wind speed averages from a low of 1 mile per hour at 6:00 a.m. to a high of approximately 12.5 miles per hour at 2:00 p.m. This average was a four-station average, not the five-station average normally used by BCAA because no wind data was available from the Pasco station. *Ex. R-13; Testimony of Dr. David Lauer.*

[16]

Data from a wind station at the Pasco Airport on October 8, 2003, also showed the same trend in wind speed. Around 6:00 a.m., wind speed recordings at the Pasco Airport station had a maximum speed of approximately 3 miles per hour, and an average speed of approximately 2 miles per hour. Wind speeds peaked in the mid-afternoon, with an average wind speed of approximately 17.5 miles per hour and an average maximum of 32 miles per hour between 1:30 p.m. and 3:30 p.m. *Testimony of Paula Butterworth; Testimony of Loren Watts.*

[17]

As wind travels along the earth's surface, it can vary with the roughness of the surface in a particular area. The roughness of an area is the resistance to wind provided by surface variations and natural or manmade structures. A flat open area with no structures has no roughness, and thus wind moves easily across the ground surface without interference. In contrast, an area with tall buildings, trees, or hills provides roughness that slows or blocks wind. *Testimony of Dr. David Lauer.*

[18]

The wind speed recorded at the Pasco Airport is not part of the five-station wind speed average used by BCAA in the Urban Fugitive Dust Policy. The purpose of the wind speed gauge at airports is to determine speed above the ground level where it can affect aircraft during takeoff and landing. In contrast, the purpose of the five wind stations used by BCAA in the Urban Fugitive Dust Policy is to measure wind speed closer to the ground where fugitive dust is created. *Testimony of David Lauer.*

[19]

The legal issues in the appeal are as follows:

1. Did Watts Construction and/or Masterson Construction violate WAC 173-400-040(2) by allowing fallout from River View Pointe [Riverview Pointe?] subdivision, Benton County, Washington, on the 8th day of October 2003?

2. Did Watts Construction and/or Masterson Construction violate WAC 173-400-040(8)(a) by failing to control fugitive dust emissions blowing from River View [Riverview?] Pointe subdivision, Benton County, Washington, on the 8th day of October 2003?

3. Are the penalties imposed under the provisions of Chapter 70.94.431 Revised Code of Washington by Benton Clear Air Authority against Watts Construction and Masterson Construction reasonable under the facts and circumstances of the case?

[20]

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

Based on these Findings of Fact, the Board enters the following

II. CONCLUSIONS OF LAW

[1]

The Board has jurisdiction over the subject matter and the parties. RCW 43.21B.110. The Board reviews the issues raised *de novo*. WAC 371-08-485(1). Findings of Fact are based on a preponderance of evidence standard. WAC 371-08-485(2). BCAA has the burden of proof in this proceeding. WAC 371-08-485(3).

[2]

Washington's Clean Air Act regulations prohibit deposition of particulate matter on another's property and require control of dust emissions:

> (2) **Fallout.** No person shall cause or allow the emission of particulate matter from any source to be deposited beyond the property under direct control of the owner or operator of the source in sufficient quantity to interfere unreasonably with the use and enjoyment of the property upon which the material is deposited.
>
> . . . .
>
> (8) **Fugitive dust.**
>
> (a) The owner or operator of a source of fugitive dust shall take reasonable precautions to prevent fugitive dust from becoming airborne and shall maintain and operate the source to minimize emissions.
>
> (b) The owner or operator of any existing source of fugitive dust that has been identified as a significant contributor to a PM-10 nonattainment area shall be required to use reasonably available control technology to control emissions. Significance will be determined by the criteria found in WAC 173-400-113 (2)(c).

[3]

The Board has analyzed these provisions in dust control cases at construction sites in the Benton County area, and stated the following:

> . . . [M]inimizing emissions does not mean a zero tolerance for dust from construction sites. The high winds and dry soils of Benton County make dust control a serious problem requiring utmost diligence from the construction industry to control dust. The guiding principle in evaluating these efforts must be whether reasonable precautions were taken to minimize emissions.

Venture Construction Inc., et al. v. BCAA, PCHB No. 97-135 (Conclusion of Law V).

> Thus, the two operative phrases [in WAC 173-400-040(8), the fugitive dust regulation], reasonable precautions and minimize emissions, must be read together in evaluating the compliance of a source operator.
>
> While this regulation does not require the elimination of all emissions, a contractor is obliged to be diligent in dust control efforts, particularly during dry, windy periods. [Appellant's] argument that the dust control efforts it made meet the standard of reasonable precaution is not supported by the evidence. While some minimal efforts were made to apply water to the site, the amounts available were insufficient to provide meaningful control and did not minimize the dust blowing onto neighboring properties or prevent tracking onto adjacent streets.

American Home Builders, Inc. v. BCAA, PCHB No. 96-147 (Conclusions of Law V and VI)

[4]

In this case, BCAA has met its burden to show that reasonable precautions to minimize dust emissions from Riverview Pointe were not implemented on October 8, 2003. Watts and Masterson were made aware of prior dust control complaints against Riverview Pointe in the months prior to the issuance of the Notice of Violation. On the day in question, only a single water truck was operating over the entire site. While the two trucks operating together may have provided the capacity needed for the 42-acre site, based on the size of the project and existence of dust control problems, the use of only the smaller truck was not a reasonable precaution to minimize dust emissions. Hydromulching of the site, identified in July 2003 as a measure to

provide dust control, had not yet been implemented. That the site was not ready for hydromulching means that greater diligence in water spraying may have been needed.

[5]

Watts and Masterson contend that the wind speed on October 8, 2003, was such that complete dust control at the site was not possible, and that the wind speed may have qualified under the definition of "dust storm" in the BCAA Urban Fugitive Dust Policy. Watts' and Masterson's basis for this contention is the wind speed data from Pasco Airport, which showed that wind speed reached 32 miles per hour during the afternoon of October 8, 2003. A similar contention was raised before the Board in *Allstar Inc., v. BCAA*, PCHB Nos. 99-021, 99-036, 99-039, 99-052. As it did in that case, the Board here concludes factually that the wind speed data from the Pasco Airport is not a reliable indicator of surface level winds as the five wind speed gauges used by BCAA in its Urban Fugitive Dust Policy.

[6]

As a matter of law, the wind speed even as high as that indicated by the Pasco Airport gauge does not provide a legal defense to the requirements of WAC 173-400-040. Under the BCAA Urban Fugitive Dust Policy, a "dust storm" based on the five wind speed gauges does not excuse compliance with the requirement in WAC 173-400-040(8) to take reasonable precautions to minimize emissions. Rather, this part of the Urban Fugitive Dust Policy presumes the implementation of the reasonable precautions required by WAC 173-400-040(8), and then excuses a site owner or operator from having to take dust control measures beyond this level

required by WAC 173-400-040 during a dust storm. This is because "the expense of additional actions under dust storm conditions would be considered unreasonable . . . " *BCAA Urban Fugitive Dust Policy*, General Policy (3). In this case, however, Watts and Masterson did not meet the baseline level of reasonable precaution required by WAC 173-400-040 and prior decisions of the Board.

[7]

Once a violation of air pollution law or regulation has been established, the Board then evaluates the reasonableness of the penalty. BCAA issued a civil penalty of $6,000 in this case. In evaluating the reasonableness of a civil penalty, the Board looks at three factors: (1) the nature of the violation(s), (2) the prior behavior of the violator, and (3) any remedial actions taken by the violator. *Taylor v. SWAPCA*, PCHB No. 94-264 (1995). If a penalty matrix is used to calculate the penalty amount, the Board will consider the determinations in the penalty matrix. The purpose of civil penalties is to influence behavior, promote compliance, and to deter future violations, both by the violator and by others in the same occupation. *Steensma v. Ecology*, PCHB No. 99-098 (2000), citing *Robert V. Lundvall v. Department of Ecology*, PCHB 86-91 (1987*); Coastal Tank Cleaning v. Department of Ecology*, PCHB 90-61 (1991*).*

[8]

In this case, Watts and Masterson contend that if an air pollution violation occurred, some of the determinations in the penalty matrix are incorrect and the penalty amount should be reduced. BCAA testified in support of the conclusions in its penalty matrix. The Board concludes that while a penalty is warranted, the penalty amount should be reduced based on two

factors. First, Watts and Masterson were responsive in correcting the violation. An additional water truck was dispatched to the site after the dust complaint was made known, and Watts performed additional weekend dust control after October 8, 2003. Hydroseeding at the site was completed after the Notice of Violation, but before issuance of the penalty. Second, unlike prior complaints against the Riverview Pointe project or other cases before this Board, there were no complaints from surrounding property owners of property damage, effects to enjoyment of property, or health impacts, at or around the time of the October 8, 2003 dust incident. Factual matters from prior complaints cannot necessarily be inferred to have occurred on the day of the violation, and in any event, BCAA has the burden of proof under of preponderance of evidence standard on these matters. For these reasons, a reduction in the penalty to $3,500 is warranted.

[9]

Testimony at the hearing established that Masterson Construction was not the proper entity to be cited by BCAA, because although Tom Masterson was hired as a development consultant to Riverview Pointe LLC, Masterson Construction was not involved. For this reason, no violation is found against Masterson Construction and no portion of the civil penalty amount should be directed to it.

[10]

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following

III. ORDER

BCAA Notice of Penalty No. 20030026 is reduced from $6,000 to $3,500, and no portion of this penalty shall be assessed against T.R. Masterson Construction.

SO ORDERED this 21st day of July 2005.

POLLUTION CONTROL HEARINGS BOARD

BILL CLARKE, Presiding

WILLIAM H. LYNCH, Member

DAVID W. DANNER, Member